UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ACEQUIP LTD., et al.,	:	
Plaintiffs,	:	
	:	
v.	:	Civ. No. 3:01cv676 (PCD)
	:	
AM. ENG'G CORP.,	:	
Defendant.	:	

ORDER APPOINTING ARBITRATOR

I. BACKGROUND

Transact International, Inc. ("Transact") entered into a construction agreement with Defendant, American Engineering Corporation, to provide construction services on a U.S. Air Force base in Okinawa, Japan. The agreement provides that "[t]his Agreement is made in accordance with the laws and statutes of the State of Connecticut. In the event of disagreement between the parties to this agreement, Arbitration shall be conducted pursuant to the laws of and in the State of Connecticut, USA." Transact subsequently assigned its rights under the agreement to Plaintiff, ACEquip Ltd.

Plaintiff and Transact filed an application for the appointment of an arbitrator on March 26, 2001 in the Connecticut Superior Court for the Judicial District of Stamford/Norwalk. Defendant removed the case to this court on April 20, 2001. Defendant's motion to dismiss for lack of personal jurisdiction, for forum non conveniens, for failure to state a claim, and for lack of standing was denied. The parties now respond to this court's order to show cause why the case should not be dismissed for lack of subject matter jurisdiction and why an arbitrator should not be appointed.

II. DISCUSSION

A. Dismissal for Lack of Subject Matter Jurisdiction

Defendant's removal application asserts diversity jurisdiction. See 28 U.S.C. § 1332. In addition to a statutory basis, a suit must also have subject matter jurisdiction under Article III of the U.S. Constitution, which limits the power of federal courts to Cases and Controversies. See U.S. CONST. art. III, § 2, cl. 1. To meet this constitutional requirement, a federal plaintiff bears the burden of establishing the three elements of standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Plaintiff invokes only CONN. GEN. STAT. § 52-411(b), which authorizes appointment of arbitrators. Its application does not invoke CONN. GEN. STAT. § 52-410(a) or 9 U.S.C. § 4, which authorize orders to compel arbitration. Even if an arbitrator were appointed, the court noted that "absent consent or an order to arbitrate, Plaintiff may not have redressed the injury it asserts, namely its right to arbitrate the cited dispute." (Ruling on Def.'s Mot. to Dismiss at 7.) Acting under its independent obligation, see United States v. Hays, 515 U.S. 737, 742 (1995), the court therefore questioned whether the third element of standing was satisfied, that "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Defenders of Wildlife, 504 U.S. at 561 (internal quotation marks omitted). Plaintiff now responds to the order to show cause.

Plaintiff reaffirms that it only seeks appointment of an arbitrator, not to compel arbitration. It presents case law to the effect that in Connecticut if an arbitrator is appointed, he or she begins arbitration, and other party decides not to participate, then the arbitrator may nonetheless still render a decision which is enforceable. See Int'l Bhd. of

Teamsters v. Shapiro, 138 Conn. 57 (1951); see also Martin J. Kelly, Inc. v. Local Union 677, Int'l Bhd. of Teamsters, 152 Conn. 276 (1964). If true, appointment of an arbitrator would redress the injury Plaintiff asserts even in the absence of Defendant's acquiescence. Shapiro persuasively holds,

> When the company refused to take part in the arbitration, the union could have applied to the Superior Court for an order compelling the company to participate. . . . The union was under no obligation, however, to pursue that course. . . . [A party] may still present his case to the arbitrators, and, if they comply with the requirements of § 8156 [now CONN. GEN. STAT. 52-413] relating to notice, they may hear evidence and . . . may make their award thereon, even though the other party refuses to appear.

Shapiro, 138 Conn. at 63 (citation omitted); accord Int'l Bhd. of Teamsters v. Purity Food Co., 17 Conn. Supp. 12, 15 (Super. Ct. 1950) (interpreting § 8157, now CONN. GEN. STAT. § 52-414).

Defendant attacks this, pointing to additional language in Shapiro. "Occasions may arise when application to the court must be made under § 8153 [now CONN. GEN. STAT. 52-410] if the arbitration is to proceed. For example, it may be necessary to compel the unwilling party to perform an essential affirmative act, such as to name an arbitrator." Shapiro, 138 Conn. at 63-64. Defendant's argument is undercut by the observation that there is no "essential affirmative act" that Defendant need perform. Arbitration provisions sometimes call for each party to pick an arbitrator, with the two selected arbitrators jointly picking a third arbitrator. If one party were to refuse to pick its arbitrator, the arbitration could not proceed in the absence of an order to compel. This is not the situation here.

This court need not resolve this issue decisively;[1] to have standing, Plaintiff's interpretation of the case law need be only "likely, as opposed to merely speculative." Defenders of Wildlife, 504 U.S. at 561 (internal quotation marks omitted). Plaintiff has standing. Only if Defendant decides not to participate and moves to vacate any arbitration award on such grounds may a definitive determination become necessary.

B. Appointment of an arbitrator

Defendant attacks the application for an appointment of an arbitrator on four grounds. First, it asserts that Plaintiff has not offered any proof that Plaintiff has an enforceable agreement with Defendant. In its application, Plaintiff puts forward a copy of an agreement between the parties, which includes a broad arbitration provision. In its answer Defendant admits this agreement. Second, it asserts that Plaintiff has not complied with the conditions precedent to create a right to arbitrate. It offers no basis for this conclusory assertion and so it is rejected. Third, Defendant argues that this court must resolve a number of legal issues (whether the assignment of the agreement from Transact to Plaintiff is valid, whether the assignment resulted in an impermissible increase in Defendant's obligations, whether Transact materially misled Defendant when it induced Defendant to enter into the agreement, whether Transact improperly modified the agreement three times without Defendant's consent) before the matter can be arbitrated. These are issues related to the contract and the parties's conduct related thereto and are

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[1] An injury for purposes of standing is "an invasion of a legally protected interest." Defenders of Wildlife, 504 U.S. at 560. If the injury asserted is the right to arbitrate then the analysis is as above. Plaintiff does address whether seeking to enforce a statutory right, here the right to appointment of an arbitrator, can and of itself be "a legally protected interest" sufficient for standing, whether or not the statutory right, standing alone, would have a meaningful effect.

for the arbitrator to resolve. Fourth, Defendant asserts that it has not yet had a chance to conduct discovery before this court so arbitration would be premature. Parties are not entitled to discovery before arbitration proceedings may commence. See Fishman v. Middlesex Mut. Assurance Co., 4 Conn. App. 339, 351 (App. Ct. 1985).

Plaintiff's application for appointment of an arbitrator is granted. The contract, the statute, the application, and the parties: none suggest a method for the choice of arbitrator. To afford the parties the opportunity to participate in the choice of an arbitrator, Plaintiff shall submit to Defendant within ten days of the date of this order the names of three person acceptable to Plaintiff and available to act as sole arbitrator. Defendant shall either choose an acceptable person from the three within ten days of receipt or if none is acceptable, Defendant shall in the alternative submit to Plaintiff within the same ten days the names of three persons acceptable to Defendant and available to act as sole arbitrator. Plaintiff shall choose an acceptable person within ten days of receipt or if none is acceptable to Plaintiff, within three days of notice of the rejection, Defendant and Plaintiff shall each designate a person from its list. The two chosen arbitrators shall within ten days choose a third arbitrator, who may or may not be one of the other four persons named by the parties. If Defendant does not respond to Plaintiff's list as permitted above, Plaintiff may designate one of its three listees and such person shall be the sole arbitrator. Arbitration shall be pursuant to the laws of Connecticut and the rules of the American Arbitration Association.

Nothing remains for this court, and, judgment having entered above, the case is hereby closed without prejudice to renewal and subject to reopening to enforce any

arbitration award. Jurisdiction of this matter is retained for that purpose.

III. CONCLUSION

Plaintiff's application for appointment of an arbitrator, (Dkt. No. 1), is **granted**. The American Arbitration Association shall act as arbitrator. The Clerk shall close the case.

SO ORDERED.

Dated at New Haven, Connecticut, _____, 2001.

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Peter C. Dorsey
Senior United States District Judge